Supreme Court, U.S.
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No. 95-408

IN THE

Supreme Court of the United States

October Term, 1995

JOHN MANSOUR and HELGA-ROSWITHA-MANSOUR,

Petitioners,

against

RONALD GOLDSTOCK and MARTIN MARCUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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Questions Presented

1. Whether this Court should grant certiorari to review a factual claim for which there is little likelihood that petitioner could establish the requisite "causation" under *Mt. Healthy Board of Ed. v Doyle*, 429 US 274 (1977), in view of the fact that a jury has already found that *petitioner would have been fired anyway for other, bona fide reasons* unrelated to petitioner's "speech" claims which survived summary judgment.

2. Whether petitioner has exaggerated the facts and issues by failing to give the full context, omitting the material fact that the disagreement between petitioner and other members of the prosecution team was *because of* petitioner's failure to consult with and discuss the arrest strategy prior to petitioner's unilateral agreement with counsel for the suspect to permit a "voluntary surrender", rather than any dispute over the legality or timing of an arrest instead of a voluntary surrender of the suspect.

3. Whether disagreement over whether to permit a suspect voluntarily to surrender (with an immediate hearing on a bail application) or to arrest the suspect prior to a weekend (when arraignment might be delayed because of court scheduling) even implicates the Constitutional threshold of speech "on a matter of public concern" since it merely involves prosecutorial discretion as to *when* and *how* to file charges which were based upon a grand jury indictment.

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Counter-Statement of the Case [1]

Petitioner attempts to frame the petition as involving a novel question of law. Although a jury found that he was fired for good cause unrelated to his alleged assertion of protected

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[1] References to "R.__" refer to the Appellate Division Record on Appeal in *Mansour v Abrams*, 185 AD2d 670, 587 NYS2d 880 (4th Dept 1992) (New York State Office of Court Administration microfiche # 4-92-0491).

"speech", petitioner omits substantive discussion of his performance history with the New York State Organized Crime Task Force ("OCTF" or "Task Force"), fails to give the full context of the specific controversy over whether to arrest or permit voluntary surrender of a suspect, and glosses over the decade-long history of this litigation. In short, petitioner has sought to present this case as involving a pure question of constitutional law when, in reality, his case carries with it heavy factual baggage which demonstrates that he was fired for abundant good cause related to his incompetence.

We supply the necessary context which petitioner omits, starting first with his employment history, followed by the specifics of the dispute over arrest-versus-surrender (on which petitioner frames his petition), and, finally, a capsule review of the decade of litigation.

1. Petitioner's poor record of performance

Petitioner was hired in 1970 by the Task Force as an attorney terminable at will (R.140, 391, 407, 894). In October of 1983, after receiving two successive, unfavorable performance evaluations, petitioner was terminated by respondents Ronald Goldstock (the Director of the OCTF) and Martin Marcus (the First Assistant in charge of Field Operations at OCTF) (R.1041-42, 1045-46, 2173). Even without such an adverse evaluation, Task Force employees, who do not enjoy civil service status, could be terminated (R.1044-45).

Respondent Goldstock was appointed as OCTF Director on June 30, 1981 (R.155, 547). Goldstock reorganized the office, implementing a "team" approach to organized crime prosecutions (R.876-77, 1181-84, 1328, 1518). This method involved close cooperation between investigators, accountants and

prosecutors (R.1165-66, 1602-04, 2222-25). Petitioner disliked these management changes, particularly since he had once enjoyed significant autonomy as a *de facto* head of the Rochester regional office of OCTF during a prior administration (R.149, 199, 547).

The implementation of the team investigative and prosecutorial approach under Goldstock's direction depended for its success on close interpersonal working relationships between the attorney and investigative members of the team (R.1602-04, 2222-25). Petitioner, by his words, deeds and attitude, made it known that he did not like the team approach (R.228-229, 233, 562-63). Attorney-advisors like petitioner were no longer "in charge" of particular cases or investigations (R.1602-04, 1606-08, 1770-72, 2054-55, 2222-25, 2272, 2298-99, 2408-2409). Instead, Task Force decision-making was to be collectively decided on such matters as strategy and tactics (R.1602-04, 1606-08, 1770-72, 2408-09).

The theory of team prosecutions and investigations was that individual team members would share their ideas and expertise and arrive at decisions by consensus (R.232-33, 1170, 1602-06, 1859-60, 2054-57). The team method also contemplated that the attorney advisor would *not* make decisions unilaterally; would *not* be "in charge" of the investigations; and would *not* have the last word or authority on matters as to which team members disagreed (R.229, 231, 235, 550-51, 564, 1612-13). Task Force policy under Goldstock was that whenever any matter of substance was not arrived at by consensus of the team, the matter would be brought to the attention of either Goldstock or Marcus or the chief investigator, Fred Rayano (R.229, 231, 235, 550-51, 1765-66, 1859-60).

Petitioner's personal diaries (*see* R.531, 629, 724-25) are replete with sarcastic and derisive comments about "absentee management" (R.681, 683, 691, 821-23, 847). At his deposition, petitioner conceded that his diaries usually reflected his state of mind (R.228-229, 241, 494-95, 517, 669, 688, 797, 813, 830-31, 843-44, 847).

In addition to those continuing differences of opinion with respondents on managerial style, a number of specific errors and mistakes by petitioner gave respondents ample reason to terminate him as a Task Force employee. Petitioner had neglected timely to seal some wiretap recordings, potentially placing an entire investigation into jeopardy if the recordings and evidence resulting therefrom was suppressed (R.304-305, 331, 668-69, 692-93, 2371-73, 2457, 2470-71).[2] Petitioner's only excuse for the untimely sealing was that he had not had time to make copies of the tape (R.2063-64). Marcus advised petitioner that such an excuse was legally dubious in the event of a suppression motion (R.2065-67). Incredibly, petitioner tried to blame the error on respondents on the basis that they had been supervising the investigation (R.270, 615-17, 668-69, 692-93).

Task Force management, as well as other members of petitioner's team, concluded that petitioner was wrong in trying to blame respondents Goldstock and Marcus for petitioner's own error in failing timely to seal a wiretap tape (R.1298, 1913-15, 1985-86, 2063). Petitioner's error in this regard was all the more shocking since another attorney in the office, Karel Keuker, had

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[2] Pursuant to New York Criminal Procedure Law § 700.55, the original tapes from wiretaps must be sealed and given to the court which issued the electronic eavesdrop warrant unless the court directs some other custodial arrangement.

reminded petitioner *in advance* of his specific obligation to seal that tape (R.2283-84, 2372-73, 2421-22). Petitioner's error in failing timely to seal the wiretap recordings also embarrassed the entire Task Force, since the FBI, which had cooperated with the Task Force on this investigation, was very upset when it learned of petitioner's error (R.1985-86).

Petitioner's botch-up on the wiretap tapes was only one of his errors or failures. He embarrassed the entire Task Force in a jointly-conducted search and seizure with State Police, Department of Motor Vehicles officials and other law enforcement officials (R.278-81, 2276-77, 2288-89, 2375-76). A large group of police and Task Force personnel had to wait over an hour to launch their operation in the field because petitioner, who was in personal possession of the search warrant, arrived late for the operation (R.280, 2288-89, 2339, 2464). The other Task Force personnel were quite embarrassed by the inconvenience this caused to State Police and others (R.2288-91, 2375-78, 2464). As Task Force investigator Domres described the incident, "there was a large amount of disgruntlement. People wondering why we were standing around waiting for an hour" (R.2377). Moreover, it was not simply a matter of inconveniencing other law enforcement personnel. The premises to be searched were a large used car and truck lot and adjacent outdoor lots and fields (R.2376-77). Because it was October, the sun was setting earlier and the late arrival of petitioner deprived the searchers of what could have been a more comprehensive search (R.2005, 2376-77, 2422).

Another similar embarrassing episode occurred when petitioner lost a confidential file which had been obtained from State Police (R.2280-82, 2368-69, 2371, 2465-66).

Yet another example of petitioner's incompetence occurred during the questioning of a suspect by a Task Force investigator when petitioner took over the interview (R.1862-63, 2354, 2382-84, 2410-11). Although, ordinarily, it would have been an inconsequential matter of merely deferring to the investigator, in this instance it actually harmed the investigation (R.2293, 2383-84, 2411). The subject of that interview, John Gannon of the Off-Track-Betting Corporation, was a friend of petitioner's (R.2293-94, 2384-85). When petitioner took over the interview and directed the questioning, petitioner actually suggested exculpatory explanations to Gannon (R.2293-94, 2382-83, 2411). As investigator Marando put it, "I was shocked that we were giving him [Gannon] a defense for something that we were there to ask him about" (R.2294).

Petitioner's lack of awareness of, or compliance with, wiretap statutory procedures was demonstrated when he mailed a notice of eavesdropping, instead of personally serving it as the statute requires (R.283-84, 2292, 2378-80). Investigator Domres stated that he lost faith in petitioner after learning that petitioner either did not know, or else simply disregarded, the legal obligation to serve the eavesdropping notices personally (R.2379-80).

At team meetings in which respondents were present, they observed that petitioner did not contribute much of anything to the discussions, largely remaining silent (R.2041-42, 2059, 2098). Petitioner simply remained too isolated from the rest of the team and had little interaction with other team members (R.2041, 2060-61, 2098-2101, 2133). Petitioner was often unavailable during the investigative planning process (R.2361-63, 2473). "It became annoying that things were happening and we'd begin discussing a problem or tactic and there would be no legal guidance" (R.2362). Investigator Marando echoed that opinion (R.2301, 2321). Likewise, investigator Becker stated

that petitioner took only a "minimal role" in developing investigations or prosecutions (R.2473).

Petitioner's incompetence was so notorious in the law enforcement community that other law enforcement agencies were reluctant to cooperate with the Task Force when they learned that petitioner would be working on the case (R.1063, 1940-42, 1985-86, 2008-09, 2317-18). The Monroe County District Attorney was extremely reluctant to cooperate with the Task Force on the stolen truck parts case because petitioner had previously ignored a statutory obligation to obtain the advance consent of the Monroe District Attorney before conducting a wiretap (R.2315). Only after respondent Goldstock personally intervened and asked the Monroe County District Attorney to abandon his objections was the case able to proceed (R.1949-50, 2315-16).

Petitioner's incompetence and reputation for incompetence caused friction between the Task Force and State Police (R.1063, 1940, 1943, 1945, 2317, 2368-69). State Police officials repeatedly complained to respondent Marcus or to Task Force investigators about petitioner's work with State Police (R.1063, 1940, 1947-48, 2317, 2368-69). Task Force investigator Domres testified at his deposition that several State Police investigators had advised the Task Force that State Police could not work with the Task Force as long as petitioner was employed there (R.2368-69). Respondent Marcus gave similar deposition testimony (R.1941-42).

Petitioner's incompetence did not begin during the managerial tenure of respondents Marcus and Goldstock. Petitioner's sanctimonious self-portrayal of himself in the Petition flies in the face of specific findings of fact by courts which awarded a huge damage verdict against the State for major mistakes made

by petitioner. Petitioner's wrongful conduct, under an earlier management team at OCTF, caused the bankruptcy of a private business and enormously costly litigation for the State, resulting in a Court of Claims verdict in excess of $1 million (with interest) -- all because of what the courts found was Mansour's improper and unprofessional conduct. *See, Della Pietra v State of New York*, Claim No. 62334 (Ct Cl July 15, 1985) (unreported decision, pp 6-7) (finding of fact that Mansour applied for a search warrant without obtaining approval of the Governor, as the statutes then required); *id.* at 12 ("the procurance and execution of the search warrant in this instance by Mr. Mansour, in his official capacity with the Task Force was unconscionable, to phrase it in the most charitable light"), *affd, Della Pietra v State of New York*, 125 AD2d 936, 510 NYS2d 334 (4th Dept 1986), *affd*, 71 NY2d 792, 798, 530 NYS2d 510, 513 (1988) (quoting Court of Claims opinion which found Mansour's conduct to be unconscionable)[3]; *Matter of B.T. Productions v Barr*, 54 AD2d 315, 388 NYS2d 483 (4th Dept 1976), *affd*, 44 NY2d 226, 405 NYS2d 9 (1978) (finding that the OCTF, then acting under the direction of John Mansour, had acted unconstitutionally in seizing private property with a jurisdictionally defective search warrant).

While petitioner's errors in the *Della Pietra -- B.T. Productions* matters, having occurred long before Goldstock took over as Task Force Director, were *not* the basis for his termination from the Task Force, the findings of fact by the courts in those cases demonstrate that petitioner never was the knight on the white horse as he implies in his Petition. He was, at best, a

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[3] The Court of Claims decision in *Della Pietra* is contained in the Record on Appeal in *Della Pietra v State of New York*, 125 AD2d 936, 510 NYS2d 334 (4th Dept 1986) (New York State Office of Court Administration microfiche # 4-86-810).

mediocre prosecutor who was eventually terminated by respondents for abundant cause.

2. The specific controversy over arrest versus surrender

Petitioner contends (Petition, pp 2-3) that his reason at the time in question for disagreeing with a Task Force investigator's plan to effect a custodial arrest related to petitioner's concern about the impropriety of arresting the suspect prior to a weekend. The record refutes petitioner's revisionist history of what was said and what happened at that time.

Petitioner's statement of the case is incomplete. By omitting important facts and exaggerating others, petitioner falsely implies that the arrest-versus-surrender disagreement turned on a difference of opinion between petitioner and respondents as to the legality of a custodial arrest in these circumstances. When the full context of the proceedings below is revealed, the alleged constitutional question evaporates.

Petitioner fails to acknowledge that the dispute over the use of a custodial arrest, rather than a voluntary surrender of a suspect, had nothing whatsoever to do with petitioner's belief or assertion *at that time* that the timing of a custodial arrest for a Friday afternoon would violate any rights of the (already indicted) suspect. That assertion in the Petition is a conveniently fabricated issue, which only became an "issue" *after* petitioner had been terminated for cause and petitioner was looking back to find some basis for a lawsuit.

The context of the arrest, which petitioner neglects to mention, is as follows. Edward Jewsbury had just been indicted by a grand jury in connection with a stolen car parts ring (R.2245-46). Jewsbury operated a junk yard in suburban

Rochester, but the stolen car parts were received from New York City (R.2245-46). Because the case involved a ring of car thieves and "fences", the Task Force understandably sought to prosecute more than the ultimate retailer of the stolen parts (Jewsbury). As a result, the Task Force would have considered "cutting a deal" with Jewsbury *if* he would have turned State's evidence and cooperated in the prosecution of others involved in the theft and fencing network.

With that background, Task Force investigator Stephen Marando considered that it would have been a useful tactic to have Jewsbury spend the weekend in jail upon his arrest, so that he would get a "taste" of prison (R.673, 2246-47). Then, the suspect, who had already been indicted by the grand jury (R.673, 2245-46), might cooperate in the prosecution of other, "bigger fish".

However, before the Task Force team -- which included attorney-advisor John Mansour (the petitioner), as well as investigators -- could meet to discuss and decide an arrest strategy, petitioner *unilaterally* agreed with the suspect's lawyer to permit the subject voluntarily to surrender, rather than be arrested (R.558-59, 2247-2248).

While it may be appropriate in some instances to permit suspects voluntarily to surrender, rather than be taken into custody (R.2252), the investigators on petitioner's team complained to their superiors (respondents) that petitioner had voluntarily agreed to that procedure without even consulting team members (R.2249). Respondent Marcus (the First Assistant in charge of Field Operations) reprimanded petitioner ***because petitioner failed to consult with team members on a matter as to which team members should have had input*** (R.1523-24, 1916-17, 2079, 2249-51, 2351, 2478). First

Assistant Marcus chose not to countermand petitioner's decision because petitioner had already made a verbal commitment with the lawyer for the suspect (R.276, 558-59, 1916-17, 2079, 2097).

Petitioner points to no contemporaneous documentation of any disagreement with Task Force management demonstrating any belief, much less any articulated disagreement, based on the rights of the suspect, Jewsbury. Instead, the record evidence shows that petitioner was concerned with "saving face" with an opposing lawyer. The notation in petitioner's office diary labelled the episode a "fiasco" and a "humiliating joke" (R.673, 826), suggestive more of intra-office friction than any constitutional issue. The investigators on the team, in sworn depositions, characterized petitioner's motives for seeking Jewsbury's surrender (rather than a custodial arrest) as petitioner's desire not to "make waves" in the legal community (R.2247-48). Despite petitioner's propensity to write memos to the file or to management on other disputed issues, at no time prior to the filing of the complaint in this lawsuit did petitioner attribute any First Amendment or "speech" reasons to his disagreement with the Team on the surrender-versus-arrest of Jewsbury.

In short, petitioner has substantially exaggerated the substance of the single episode on which he seeks to frame a claim of a constitutional violation.

3. Petitioner's lawsuit against respondents

Although respondents will not burden this Court with a full recapitulation of the ten years of litigation in the courts below, we highlight three facts worthy of emphasis: *first*, petitioner had full and complete discovery, encompassing thousands of pages of documents and repeated depositions of respondents and other Task Force employees; *second*, despite substantial grounds for dismissing the entire complaint via summary judgment -- either on the basis of the failure of any of petitioner's "speech" to rise to the level of a constitutional issue of "public concern" *or* on the basis of qualified immunity -- the courts below bent over backward to give petitioner his day in court before a jury; and, *third*, a jury, on the basis of a jury charge to which petitioner consented, expressly found that respondents had other, good grounds for terminating petitioner *even if* any of petitioner's "speech" also played a role. We briefly outline these three facts to demonstrate that it would be a waste of time and judicial resources to grant this petition.

First, as to exhaustive discovery. Although an earlier, scattergun complaint with eleven purported causes of action had been dismissed on the pleadings upon the ground that it failed to state a cause of action, the intermediate appellate court reinstated the complaint on the basis that, at the pleadings stage, petitioner should be given every possible favorable reading of the complaint. *Mansour v Abrams*, 120 AD2d 933, 502 NYS2d 877 (4th Dept 1986). After limited discovery, respondents moved for summary judgment. The intermediate appellate court affirmed the denial of summary judgment on the basis that discovery should be exhausted prior to the consideration of the summary judgment motion on the merits. *Mansour v Abrams*, 144 AD2d 905, 906, 587 NYS2d 379 (4th Dept 1988).

Thereafter, exhaustive discovery was conducted. Petitioner deposed the Attorney General of the State of New York, the Director of OCTF (respondent Goldstock), the First Assistant of OCTF in charge of field operations (respondent Marcus), as well as attorneys, investigators and other OCTF staff. Petitioner obtained thousands of pages of documents, including personnel records of other employees who were on petitioner's "team" or "group" within OCTF. Before defendants renewed their summary judgment motion, petitioner advised the trial court that petitioner was satisfied that discovery had been thorough and complete.

Second, the courts below never reached or decided the question of respondents' entitlement to qualified immunity, thereby allowing petitioner to present his case to a jury. The trial court granted partial summary judgment to respondents, by dismissing some of the specific allegations premised on the First Amendment. *Mansour v Abrams*, 151 Misc 2d 121, 573 NYS2d 364 (Sup Ct Monroe Co 1991). Petitioner and respondents cross-appealed. On petitioner's appeal, the intermediate appellate court affirmed for the reasons stated by the trial court. *Mansour v Abrams*, 185 AD2d 671, 587 NYS2d 880 (4th Dept 1992). On respondents' appeal, the Appellate Division affirmed, refusing to reach the merits of respondents' qualified immunity defense. The trial judge had expressly ruled that the issue of qualified immunity would be held in abeyance until after trial. *Mansour v Abrams*, 185 AD2d 670, 587 NYS2d 879 (4th Dept 1992).

Third, the jury found in favor of respondents on the basis of the *Mt. Healthy* "dual motive" doctrine, *i.e.*, the jury found that, regardless of any of petitioner's "speech", respondents could and would have fired petitioner anyway for good and valid reasons.

The case was tried for six days before a jury in July of 1994. In response to special interrogatories, the jury answered "YES" to the questions as to (1) whether petitioner's "speech" regarding the OTB/Herman Grand Jury report was a substantial or motivating factor in the defendants' decision to discharge him; (2) whether his "speech" relating to the return of a truck chassis was a substantial or motivating factor in the defendants' decision to discharge him; and (3) whether petitioner's "speech" on the recording of statements made by Mr. Wnuk was a substantial or motivating factor in the defendants' decision to discharge him.

The jury also found, in response to a separate interrogatory, that defendants had proven that they would have fired petitioner anyway *because of his job performance* even if petitioner had not engaged in any constitutionally protected speech.

ARGUMENT

The petition is plainly without merit. A jury found, in response to special verdict questions as to which petitioner did *not* object, that petitioner would have been fired anyway for his inadequate job performance.

There is no occasion for this Court, in this or any other case, to engage in an academic exercise of reviewing hypothetical questions of constitutional law. The factual finding of the jury -- that respondents were justified in firing petitioner because of his inadequate job performance -- is dispositive of the case. This Court in *Mt. Healthy City School Dist. v Doyle*, 429 US 274, 284-287 (1977), held that an employee who would have been fired anyway (because of inadequate job performance) should not be placed in a better position merely because he or she engaged in "protected speech". Employees terminable at

will should not be able to elevate their status to tenured employees by engaging in protected "speech" when they would have been terminated anyway for reasons of job performance. 429 US at 286.

The trial judge had earlier denied respondents' motion for dismissal on the basis of qualified immunity, with leave to renew *after trial*. The Appellate Division did not disturb that ruling, affirming for reasons stated below. *Mansour v Abrams*, 185 AD2d 671, 587 NYS2d 880 (4th Dept 1992). Thus, respondents had to endure ten years of litigation and a trial on the merits and the issue of their entitlement to dismissal on the basis of qualified immunity was never resolved. *See, Mitchell v Forsyth*, 472 US 511, 526 (1985) ("[L]ike an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."); *Siegert v Gilley*, 500 US 226, 231-235 (1991) (unless petitioner establishes, as a threshold matter, that the relevant constitutional right is clearly established in terms of analogous precedents on the books, defendants should not even be burdened with pre-trial discovery).

On the merits, the only "speech" relied upon in the petition fails to rise to the threshold of speech on a "matter of public concern." The sole authority cited by petitioner in support of the claim that it would have been improper to arrest the suspect just before a weekend (when bail might have been unavailable), is a trial court decision which is unreported in the official reports. *Rothbard v Ringler*, n.o.r., 77 NYS2d 351 (1947). At most, that case supports the view that deliberate timing of an arrest warrant as a tool to enforce a support order in a matrimonial case *might* constitute the common law tort of abuse of process. *Rothbard*, 77 NYS2d at 353. There was no claim of, and no court analysis regarding, constitutional issues in *Rothbard*. It is settled in this Court that suspects arrested pursuant to facially valid warrants

have no constitutional claim based on having been jailed pending arraignment or a bail hearing. *Baker v McCollan*, 443 US 137 (1979). As then-Justice, now Chief Justice, Rehnquist stated in *Baker* (443 US at 144, 145):

> Respondent was indeed deprived of his liberty for a period of days, but it was pursuant to a warrant conforming, for purposes of our decision, to the requirements of the Fourth Amendment. *** But we are quite certain that a detention of three days over a New Year's weekend does not and could not amount to such a [constitutional] deprivation. [¶] Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law. The Constitution does not guarantee that only the guilty will be arrested. (Footnote omitted.)

It would be a waste of time and judicial resources to grant the petition. Because the state courts here bent over backward to allow petitioner to present claims to a jury, to this day the qualified immunity defenses asserted by respondents have never been decided! After a decade of litigation, onerous and burdensome discovery, bulky summary judgment records amassing thousands of pages and a one-week jury trial (resolved in favor of respondents), no court or judge ever ruled on the merits of respondents' qualified immunity defenses. In each instance, the courts deferred the issues until, if ever, petitioner prevailed on the merits. Petitioner got far more leeway and latitude in litigating his case than the qualified immunity doctrine ever contemplated. Despite that, petitioner seeks another bite at the apple. Respondents have been burdened enough with this litigation.

CONCLUSION

This court should deny the writ.

Dated: Albany, New York
October 6, 1995

Respectfully submitted,

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